UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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JOHN HUANG,

Plaintiff,

v.

RICHARD W. WIEKING, JEANE DEKELVER,

Defendants.

NO. CIV. S-07-0589 WBS

ORDER RE: MOTION TO DISMISS

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Plaintiff John Huang brought this action for damages, based on allegations that his termination by defendants violated his due process and equal protection rights guaranteed under the Fifth Amendment to the United States Constitution. Defendants now move to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. Factual and Procedural Background

Beginning on November 29, 1999, until his subsequent termination on November 14, 2006, plaintiff was employed by the United States District Court for the Northern District of

California ("Northern District") as a Deputy Clerk and Financial Technician. (Compl. 2.) Defendant Richard Wieking is the Clerk of the Court, and defendant Jean DeKelver, plaintiff's superior, serves as the Criminal Justice Act ("CJA") Unit Supervisor. (Id.)

As a member of the "excepted service" of the civil service (5 U.S.C. § 2103(a)), Huang's employment was governed by the Civil Service Reform Act of 1978 ("CSRA"), an elaborate remedial statutory scheme which establishes the rights and benefits of civil service employees. Pub. L. No. 95-454. In the event that an "adverse action" is brought against a civil service employee, the employee may pursue an appeal of that decision via one of two detailed appeals procedures, whereby the decision is reviewed by a mediator, the Clerk of the Court, and/or the Chief Judge.[1] (Garchik Decl. Ex. A Chapter 19.)

On October 20, 2006, plaintiff was served with a Notice of Adverse Action from defendant DeKelver, which informed him of his immediate termination. (Pl's Opp'n to Mot. to Dismiss 3.) The notice advised him that he was being terminated based on unacceptable performance in 1) his ability to focus on work without constant supervision, 2) his ability to work

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[1] An adverse action may be appealed either via the Employee Dispute Resolution ("EDR") Plan for the Northern District, or, when there are allegations of discriminatory treatment, the "Grievance and EEO Policy" contained in the Human Resources Manual for the Clerk's Office for the Northern District. (Garchik Decl. Exs. A, B.) The EDR Plan contains an "Election of Remedies" clause, which specifies that if an employee appeals an adverse action, he "must elect either (a) the EDR Plan or (b) the grievance/adverse action appeal procedures . . ." (Garchik Decl. Ex. A, Chapter VIII, §2.G.) An employee may not utilize both. (Id.)

independently, 3) his ability to function at the level required, and 4) his attendance. (Garchik Decl. Ex. C at 1 (Notice of Adverse Action).)

On October 27, 2006, plaintiff responded to defendant Wieking with a memo, objecting to DeKelver's Notice of Adverse Action and requesting an appeal. (Pl's Opp'n to Mot. to Dismiss 3.) Wieking responded by letter to plaintiff on November 1, 2006, informing him that a hearing date for his appeal had been set for November 9, 2006, pursuant to the "Grievance and EEO Policy" procedures in Section 19.6.A of the Human Resources Manual. (Id.) On November 9, 2006, Wieking held an administrative hearing, which was attended by plaintiff and plaintiff's counsel, as well as DeKelver, CJA Administrator Pat Harris, Administrative Manager Anita Bock, and Human Resources Supervisor Beverly Keh-Hoy. (Garchik Decl. Ex. C at 23 (Wieking letter to Huang).) After considering all the facts, Wieking issued a letter on November 14, 2006, which explained his determination that the Adverse Action was valid and plaintiff's termination was to become effective immediately. (Id. at 64.)

On November 21, 2006, plaintiff sent a letter to Ms. Keh-Hoy, reiterating his belief his termination was in violation of fair and equal employment guidelines and arguing that the decision rendered by Wieking was merely a pretext for perpetuating this unlawful discrimination. (Id. Ex. D at 1 (Charge of Employment Discrimination.) The letter contained a complaint form filled out by plaintiff, which sought resolution of his dispute under the EDR plan. (Id.) On November 27, 2006, Ms. Keh-Hoy responded to plaintiff's letter, informing him that

pursuant to the EDR Plan's "Election of Remedies" provision, Huang's hearing (which constituted an appeal under the Clerk's Office adverse action appeal procedures) meant he was ineligible to also file a complaint under the court's EDR Plan. (Id. at 5.)

On February 13, 2007, plaintiff filed a first amended complaint against defendants, alleging that 1) his termination violated his Fifth Amendment right to equal protection under the law, and 2) the subsequent grievance procedures employed by defendants violated his Fifth Amendment right to due process. (First Amended Complaint ("FAC").) Plaintiff seeks damages for lost wages and benefits, as well as costs of suit. (FAC 5.) Defendants argue that the court lacks subject matter jurisdiction over plaintiff's claim and/or that the complaint fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(1) & 12(b)(6).

II. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972). The court may not dismiss for failure to state a claim unless "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v. CNN, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Dismissal is appropriate, however, where the pleader fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.

1988).

In general, the court may not consider material other than the facts alleged in the complaint when ruling on a motion to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). However, the court may consider materials of which it may take judicial notice, including matters of public record. Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988); Fed. R. Evid. 201(b) (defining the scope of judicial notice); see also Mack v. S. Bay Beer Distribs., 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) ("A court may take judicial notice of 'records and reports of administrative bodies.'") (quoting Interstate Natural Gas Co. v. S. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953)). Because the additional materials submitted by plaintiff in opposition to this motion (the Grievance and EEO Policy, the EDR Plan, and the administrative record of plaintiff's termination) are part of the public record, the court may properly consider them here.

B. Fifth Amendment Bivens Action

In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), the Supreme Court held that a violation of the Fourth Amendment by a federal agent while acting under the color of his federal authority may give rise to a cause of action for damages. The Court reasoned that, while the Fourth Amendment does not explicitly provide a cause of action for damages resulting from unconstitutional conduct, it is well settled that when "legal rights have been invaded, and a federal statute provides for a general right to sue for such

invasion, federal courts may use any available remedy to make good the wrong done." Id. at 396 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). The court subsequently extended the Bivens cause of action to apply to violations of the Fifth Amendment as well. Davis v. Passman, 442 U.S. 228, 248 (1979).

However, in both Bivens and Passman, the Supreme Court recognized that creating such a remedy was proper only because 1) there was no "explicit Congressional declaration" that a person with plaintiff's injury could not recover damages, and 2) there were "no special factors counseling hesitation in the absence of affirmative action by Congress." Bivens, 403 U.S. at 396-97; Passman, 442 U.S. at 245-47. Conversely, when the "design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations in the course of its administration," a judicially created remedy is not appropriate. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (refusing to allow a Fifth Amendment Bivens action for allegedly discriminatory administration of Social Security benefits, because "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program") (citing Bush v. Lucas, 462 U.S. 367, 368 (1983)). Accordingly, when there are "indications that congressional inaction has not been inadvertent," both the Supreme Court and the Ninth Circuit refuse to create a Bivens action. Schweiker, 487 U.S. at 423; Moore v. Glickman, 113 F.3d 998, 994 (9th Cir. 1997).

In Blankenship v. McDonald, the Ninth Circuit considered whether a Bivens action would be proper in the context

of an employee covered by the CSRA. 176 F.3d 1192 (9th Cir. 1999). The court observed that "[t]he CSRA contains an 'elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations . . . .'" Id. at 1195 (quoting Bush, 462 U.S. at 388). Accordingly, because there was "no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violated a subordinate's constitutional rights," the court held that "the CSRA precludes a Bivens remedy . . . ." Id. (quoting Saul v. U.S., 928 F.2d 829, 840 (9th Cir. 1991)) (noting that in the area of federal employment, Congress was better equipped to strike the balance between employees' interests in remedying constitutional violations and competing government interests of efficiency, morale, and discipline).

This case is indistinguishable from Blankenship -- plaintiff's employment and corresponding remedial measures are governed by the CSRA, which unequivocally precludes a Bivens action as a matter of law. This same conclusion has been reached by every circuit court that has addressed the question. See Dotson v. Griesa, 398 F.3d 156 (2d Cir. 2005) (citing Lombardi v. Small Bus. Admin., 889 F.2d 959, 961 (10th Cir. 1989); Feit v. Ward, 886 F.2d 848, 854-56 (7th Cir. 1989); Volk v. Hobson, 866 F.2d 1398, 1403 (Fed. Cir. 1989); Spagnola v. Mathis, 859 F.2d 223, 228-29 (D.C. Cir. 1988); Pinar v. Dole, 747 F.2d 899, 910-12 (4th Cir. 1984); Braun v. United States, 707 F.2d 922, 926 (6th Cir. 1983); Broadway v. Block, 694 F.2d 979, 985 (5th Cir. 1982)).

In opposition to the present motion, plaintiff argues

that, regardless of the prohibition against Bivens actions, his termination was constitutionally defective because it never received adequate judicial review. Plaintiff cites to 28 U.S.C. § 751(b), which indicates that employees such as plaintiff are subject "to removal by the clerk with the approval of the court." 28 U.S.C. § 751(b) (emphasis added).[2] At the hearing on the motion, counsel for plaintiff argued that this statute entitled plaintiff to review of his termination by a judge acting in his or her judicial capacity exercising full powers under Article III of the United States Constitution. However, when pressed by the court, counsel was unable to cite to any authority, based in either case-law or statute, which supports this assertion.

Just because a statute provides for certain procedures, it does not follow that any party who feels aggrieved because those procedures were not properly followed may bring an independent action for damages. See Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979)). Without explicit action by Congress creating a private right of action, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Id. (citations omitted). Section 751(b) sets out the authority of the clerks of court to appoint and remove clerical assistants and employees. There is no suggestion that the inclusion of the words "with the approval of the court" was

[2] Notably, brief review of the administrative record reveals that plaintiff's termination was reviewed by Judge Phyllis J. Hamilton, the Chair of the Court Personnel Committee. (Bock Decl. ¶ 3, Ex. 2.)

intended to confer a private right of action on anyone. To the contrary, most likely that language was included simply to reaffirm that the judges, and not the clerk, retain ultimate authority over the workings of the court.

The Second Circuit in Dotson v. Griesa (wherein the court found that, like in Blankenship, the CSRA precluded a Bivens action) engaged in a comprehensive analysis of the remedies available to a judicial employee, and held unequivocally that judicial review was not a right afforded employees such as plaintiff. 398 F.3d at 163-65. The court explained that, while the CSRA provides a right of judicial review for some civil service employees, those that Congress intentionally excepted from such protections have no such right. Id. The Dotson court reiterated the Supreme Court's holding in United States v. Fausto, which found that "[t]he comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review . . . combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that chapter." U.S. v. Fausto, 484 U.S. 439, 448-449 (1988). courts.[3]

[3] Plaintiff cites a single district court opinion from the District of Connecticut, which held that a Bivens action could be maintained, despite the existence of the CSRA, because the defendants in that case completely precluded the plaintiff from pursuing the CSRA statutory remedies. Rauccio v. Frank, 750 F. Supp. 566 (D. Conn. 1990). Rauccio, however, is directly contradicted by Ninth Circuit law, which clearly holds that "the

Put simply, when a statutory remedial scheme exists (as it does here with the CSRA), an aggrieved employee may not bring a Bivens action for damages, even if the employee believes the scheme was improperly implemented. When Congress has legislated to create (or not create) employee remedies in a particular area, it is not the place of the judiciary to allow a Bivens action and inquire into the proper administration of those remedies. Schweiker, 487 U.S. at 423; Moore v. Glickman, 113 F.3d 988, 994 (9th Cir. 1997). If this court were to engage in such an inquiry, and expose judicial clerks and supervisors to individual liability for their employment decisions, it would severely undermine the "inevitable compromises" behind the delicately balanced CSRA statutory regime crafted by Congress. Schweiker, 487 U.S. at 429.

III. Conclusion

Plaintiff's Bivens action for damages, alleging violations of his Fifth Amendment rights stemming from his termination and subsequent appeal thereof, is precluded as a matter of law by the statutory remedial scheme of the CSRA. See Blankenship v. McDonald, 176 F.3d 1192 (9th Cir. 1999). The complaint therefore fails to state a claim upon which relief may be granted.

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CSRA precludes even those Bivens claims for which the act prescribes no alternative remedy." Saul, 928 F.2d at 840 (emphasis added); see also Moore v. Glickman, 113 F.3d 988, 994 (9th Cir. 1997); Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989); Blankenship, 176 F.3d at 1195.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss be, and the same hereby is, GRANTED;

AND IT IS FURTHER ORDERED that the complaint and action herein be, and the same hereby are, DISMISSED.

DATED: May 30, 2007

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE